IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.762 OF 1989.

P.C.Ramakrishnan. .... Appellant.

Versus.

1. The Municipal Corporation of
Greater Bombay.
2. Shri D.B.Khade. .... Respondents.

Shri M.U.Pandey for the Appellant.

Shri J.J.Xavier for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 23rd March, 2006.

ORAL JUDGMENT.

1. Heard the learned Advocates appearing for the parties. By this First appeal the original Plaintiff has taken exception to the Judgment and Decree dated 22nd June 1989 passed by the learned Judge of the City Civil Court, Mumbai. By the impugned Judgment and Order, which is a common judgement and order passed in several suits, the learned trial Judge dismissed the Notice of Motion for interim relief as well as the suit. So far as the present Appeal is concerned, it relates to L.C.Suit No.5312 of 1984 filed by the Appellant. By the impugned Judgment and order, the suit and the Notice of Motion for temporary injunction filed by the Plaintiff has been dismissed.

2. The learned Advocate for the Appellant submitted

that the learned trial Judge has committed an error by dismissing the suit after hearing the arguments which were limited to the merits of the Notice of Motion for temporary injunction. He submitted that the suit was never fixed for hearing. He pointed out that the Respondents had not filed written statement and even issues were not framed. He pointed out the entries in the Roznama of the suit and submitted that at no stage the suit was fixed for hearing and therefore, the suit should not have been dismissed without giving an opportunity to the Appellant to lead evidence.

3. Shri Xavier appearing for the Respondent No.1 submitted that as the suit itself was not maintainable, the learned trial Judge was justified in dismissing the suit. He submitted that the learned trial Judge was entitled to adopt the course which he has adopted in view of the provisions of Rule 1 of Order XV of the Code of Civil Procedure, 1908. He, therefore, submitted that no interference is called for.

4. I have considered the submissions. In the impugned Judgment and order, the learned trial Judge has framed four points for consideration. The first point is regarding existence of a prima-facie case for grant of temporary injunction. The second point is regarding the bar of limitation and non-maintainability of the suit on account of the failure of the Appellant to give a statutory notice, the third point is regarding balance

of convenience and irreparable injury and the fourth one is an usual point regarding the order in the suit and the notice of motion. While recording the finding on point No.2, the learned Judge has held that the suits which were before him, were time barred and therefore, Notices of motion for temporary injunction were also time barred. He held that the suits were liable to be dismissed on account of non-compliance with the provisions of section 527 of the Bombay Municipal Corporation Act, 1888.

5. Perusal of the roznama of the suit shows that all along the notices of motion taken out by the Appellant and the Plaintiffs in other companion suits were on board. Roznama dated 22nd November 1988 shows that the notice of motion taken out by the Appellant was dismissed for default as the Advocate for the Appellant was not present. Roznama further records that the Respondents were directed to file written statement within a period of 8 weeks. Usual order of discovery and inspection was passed. Subsequently on the same date, the Advocate for the Appellant appeared and orally prayed for restoration of the Notice of Motion. Accordingly the Notice of Motion was restored and was kept for hearing along with the notices of motion filed in the companion suits. The entries made on 29th November 1988, 5th December 1988, 12th December 1988, 16th December 1988, 19th December 1988, and 12th January 1989 show that all along the Notice of Motion was being

adjourned for hearing. Roznama of the proceedings shows that till date of passing the impugned order, written statement was not filed by the Respondents. Roznama discloses that there was no order passed by the learned Judge directing that the suit will proceed without written statement of the Respondents. There is no order passed for fixing the suit for hearing or for exparte hearing.

6. By the impugned order, the learned Judge has proceeded to record a finding that the suit was barred by limitation. The issue of limitation is not a pure question of law and it is a mixed question of law and facts. The said issue could not have been decided without framing preliminary issue. Even if the issue regarding jurisdiction of the Court was raised at the time of hearing of the Notice of Motion, the learned Judge was required to frame a preliminatry issue as regards jurisdiction and give an opportunity to the parties to lead evidence. Reliance was placed by the learned Advocate for the Respondents on the provisions of Rule 1 of Order XV of the said Code of 1908. The provision of the said Rule comes into picture only after the issues are framed under Order XIV of the said Code.

7. Moreover Roznama shows that the parties were never put to notice that the merits of the suit were being considered. From the roznama it appears that parties were never put to notice that while deciding the

Notice of Motion for temporary injunction, the suit will be decided on merits. In fact the suit could not have been decided at that stage. The entire approach of the learned Judge is not only erroneous but is contrary to the express provisions of the said Code. In my view, while deciding the notice of motion for temporary injunction, the learned Judge could not have considered the merits of the suit. Therefore, the only course open for this Court is to remand the suit to the trial Court. It must be noted here that along with the Appeal, the Appellant had filed Civil Application No.3787 of 1989 on which interim relief of temporary injunction was granted by this Court on 22nd August 1989 and the said interim relief was confirmed on 27th August 2003. No purpose will be served by remanding the Notice of Motion for temporary injunction as interim injunction granted by this Court is operating for last about 16-1/2 years. Considering the fact that the suit is of the year 1984, the same will have to be heard expeditiously.

8. Hence the following order is passed:

i) The impugned Judgment and Decree is quashed and set aside in so far as L.C.Suit No.5312 of 1984 is concerned.

ii) L.C.Suit No.5312 of 1984 is restored to file of the City Civil Court at Bombay.

iii) The Respondents will file written statement within a period of 16 weeks from today and the suit will be decided as expeditiously as possible and preferably on or before 31st March 2007.

iv) The interim relief granted in Civil Application No.3787 of 1989 will continue to operate till final disposal of the suit subject to condition that the Appellant will not part with possession of the suit structure and will not carry out any additions and alterations to the suit structure without the permission of the trial Court.

v) The parties are directed to appear before the learned Principal Judge of the City Civil Court, Bombay, on 19th June 2006 at 11.00 a.m. The learned Principal Judge will assign the suit to the appropriate Court for final hearing.

vi) Office is directed to forthwith transmit the record and proceedings of this suit to the trial Court.

vii) All contentions of the parties on merits are kept open. The continuation of the interim relief granted at the stage of admission will not be construed as any expression of opinion on merits of the case by this Court.

viii)The First Appeal is allowed partly in the above terms with no order as to costs.

ix) The parties and the trial Court is directed to act on an authenticated copy of this order.

Judge.